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In The Supreme Court of the United States

October Term, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS,

Petitioners,

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. McNALLY, VICTOR G. MARROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council for City of Harper Woods, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

SHOULD THE "SHOCK THE CONSCIENCE" TEST FOR INVOKING FEDERAL COURT JURISDICTION FOR SUBSTANTIVE DUE PROCESS VIOLATIONS IN LAND USE CASES BE FOLLOWED AND SHOULD THE SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS BE RESOLVED IN FAVOR OF ONE TEST?

LIST OF PARENT COMPANIES AND NONWHOLLY-OWNED SUBSIDIARIES

Woodpointe Associates Limited Partnership has no parent companies or nonwholly-owned subsidiaries.

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Petitioners, WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP, THOMAS A. HANDLOS and LUCILLE HANDLOS, respectfully pray that a writ of certiorari issue to review the Order of the Sixth Circuit entered in this proceeding on March 7, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 48 F.3d 1220, 1995 WL 94760 (6th Cir. 1995).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on March 7, 1995. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1, provides:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * * "

42 USCA § 1983 provides that:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

This action involved use of a parcel of land, located in the City of Harper Woods (the "City"), which was sold by the City as "C-1," commercial property after the construction of Interstate I-94.

In 1979, Plaintiffs became interested in the property as a potential hotel site and inquired with the City, receiving a positive and encouraging response.

According to the City Ordinance, in order to build a hotel project, Plaintiffs were required to receive special approval of the City Council in order to build a hotel within the City. Such use was to be permitted by the

City Council after a public hearing and review of the proposed site plan by the City Planning Commission. Section 10-164 uses the term "shall" rather than "may," designating that the special use permit was non-discretionary rather than discretionary when the site plan met the requirements.

As the hotel site became known to the public, a certain nearby resident, Defendant McNally, expressed his opposition to having a hotel close to his home. He thereafter used a strong opposition campaign to the hotel project to gain political popularity and become a City Council member. (See Campaign Material and Letter to Neighbors in separately-bound Appendix at A-15–A-20.) His expressed goal was to be elected district judge for the City. His initial opposition consisted initially of going door to door delivering brochures, speaking up at public meetings and encouraging the public to join him in the opposition. His conduct included misstatements about the Hotel Project including that it would: Attract undesirable people and place them near the residential homes; attract threatening criminals, burglars and prostitutes; Confuse "out-of-town" drivers who would not understand the traffic patterns and would ignore traffic signs; depress their property values and cause homes to be torn down; and possibly be run and operated by dishonest or inconsiderate people whose future uses may not be acceptable to the neighbors.[1]

After election to the City Council, Defendant McNally continued to recruit other counsel members, as well as the public, to oppose the project, stating his reiterated, unfounded objections. Because of Defendant McNally's

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1 The City of Harper Woods is virtually a 98% Caucasian community annex to the northeast portion of the City of Detroit, a community consisting of mostly African Americans. The statements by Defendant McNally relating to Plaintiffs' hiring of minorities and the hotel project attracting "*undesirable people*," "out-of-town" drivers, criminals, prostitutes, burglars, etc. implied those residents from the City of Detroit. Plaintiffs alleged that Defendants were motivated to prevent the construction of the hotel project in order to deter minorities from Detroit from working and loitering on property nearby to their residential homes. These allegations were based on Defendants' statements and actions toward the hotel project.

ill-motives, Plaintiffs were forced to endure years of obstructions and obstacles.

In May of 1991, the City approved a special use permit for the proposed hotel project and determined that it complied with the City Ordinances. The City Council conditioned the permit with several difficult provisions which were intended to and would discourage and hinder the hotel project from going forward. For example, for the first time ever in the history of the City on private developers, it required Plaintiffs to submit a bond equal to 5% of the value of the entire project including buildings prior to any construction permits.

Due to the extenuating, unexpected circumstances that year suffered by the developer, he was unable to initiate the construction as anticipated. He suffered a disease which amounted to sudden deafness and extreme vertigo (dizziness) which required extensive surgeries and bed-rest which made correspondence with other individuals associated with the hotel project difficult. On two occasions during the one-year period to commence construction, he requested an extension of time. Defendants refused to grant an extension. When the developer attempted to go forward to meet the one-year construction requirements, tendered a 5% bond and building permit application for the first phase, the City refused to accept the bond and grant a building permit. When the developer attempted to cut the curb in order to allow some types of construction which did not require a building permit, the City halted his work, claiming that he should have used more expensive machinery on "such an expensive project" despite that his method was also a customary method used previously within the City.

When the special use permit finally expired, Plaintiffs reapplied with virtually the same plan. *There was no substantial change of circumstances which was asserted to have affected the decision on a special use permit for*

the hotel project. The City Planning Commission, City Planner and City Manager again approved the site plan and recommended approval of the special use permit as being in compliance with all City Ordinances.[2]

The City Council public hearing was held on October 5, 1992. Despite the site plan's compliance with the City Ordinances and the previous recommendations, the City Council denied the special use permit.

Defendant McNally made a public statement against the hotel project that although section 10-164 of the City Ordinance stated that the City Council *shall* permit certain uses, the term "shall" did not always mean "shall" but really meant "may," giving discretionary power to the City Council. Defendant McNally went on to point out what he believed were the faults in the site plan. He concluded his lengthy speech with the following statement about the project:

> "A few years ago I developed an allergy to dogs. And it was pretty sad because I always really like dogs a lot. My wife knew how much I liked dogs, so she went out and bought me a little terrier. She knew too that I had an allergy to dogs, so she told me it was a cat. She said it was a cat so it shouldn't bother you. Well, I still sneezed, and my eyes still watered, and we had to give the cat away. Despite the fact that she called it a cat, it was still a dog and I was still allergic to it. *Well, Mr. Handlos has presented us a smaller project. He says it requires less parking and will generate less traffic. He says the sewer can handle it. But I say it's still a dog, and I'm still allergic to it. And I'm*

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2 See excerpts of deposition transcripts for Planning Commission members John Soullier, Neil Patterson, Alexander Varchetti, and City Planner Brandon Rogers, which demonstrate the hotel project's compliance with the City Ordinances, reproduced in the Appendix hereto at A-23, A-24, A-25 and A-21, respectively.

going to vote no." City Council Meeting Minutes, October 5, 1992, p. 17.

Consistent with the determinations and recommendations of its Planning Commission, the City Manager and the City Attorney that there was full compliance with the City Ordinances, as appears in the record of the City Council meeting minutes of October 5, 1992, there was no basis of turning down the request for reapproval of the special use permit. The request was for reapproval of what had been approved by the City Council on May 5, 1991, without any substantial changes. The City Council's denial was a final step of Defendants in a long line of actions which made it impossible to develop the property.

Following the denial of a special use permit on October 5, 1992, Defendants were served with the Complaint, alleging among other things, a substantive due process violation for denying the special use permit.[3]

Defendants' position against Plaintiffs' substantive due process claim was two-fold: One, that Plaintiffs have never followed through with any of the several proposed projects, and; Two, that Plaintiffs did not have the "wherewithal" to develop the property as a hotel project. First, there is no dispute that the different projects were proposed; only one was ever approved by Defendants. The only reason the project was not timely commenced under that permit was because the developer became severely ill for the duration of most of that

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[3] **The Verified Complaint contained six counts: Count I – A Taking Without Just Compensation or Deprivation of Property; Count II – Deprivation of Equal Protection of Law; Count III – Deprivation of Substantive Due Process of Law, Vagueness, Unfairness and Unreasonableness; Count IV – Deprivation of Procedural Due Process of Law; Count V – Unconstitutional Municipal Ordinance or Unconstitutional Application of A Municipal Ordinance; and Count VI – Conspiracy to Interfere With Civil Rights. For a more detailed statement of facts and allegations, see the Verified Complaint as reproduced at pages 67-204 of Plaintiffs' Appendix filed with the Sixth Circuit Court of Appeals.**

year. Previously and thereafter, Defendants created nothing other than "roadblocks" concerning the development of the property. Second, Defendants claimed their actions were due to questions about Plaintiffs' ability to follow through with the hotel project; however, they did not even inquired into Plaintiffs' business or financial background until *after* the instigation of this lawsuit. Even after the suit was filed, Defendants discovered that Plaintiffs' success rate was 100 percent with previous development and management of an office building, a condominium project and a resort complex.

In addition to those actions listed above, Defendants also acted arbitrarily and capriciously towards Plaintiffs by maliciously and drastically increasing the undeveloped property assessment for the Harper Property from $33,210 to $157,500 to harass Plaintiffs and enacting a fast food restaurant restriction ordinance per Defendant McNally's suggestion for the sole purpose of "blocking" Plaintiffs' ability to construct a fast-food ordinance on the proposed hotel site, which at one time was the only reasonable alternative to development. Defendants told Plaintiffs that no permit was necessary before performing a curb-cut, but Defendants Leidlein and Owczarzak reversed that order position when they became aware that Plaintiffs had commenced construction under the special permit by ordering Plaintiffs to cease cutting the curb, which was obviously done for the purpose of obstructing Plaintiffs' ability to commence construction.

On February 24, 1993, upon Defendants' Motion to Dismiss, the United States District Court, Eastern District of Michigan dismissed Counts I, IV, V, and VI but refused to dismiss Count II (Equal Protection) and Count III (Substantive Due Process) asserting that "plaintiffs, again, have at least alleged certain things, arbitrary, capricious conduct, which is a fact matter that may shock the conscience." (See Order Granting In Part, Denying In Part Defendants' Motion to Dismiss and transcript, A-10–A-14.)

On August 25, 1993, upon hearing Defendants' Motion for Summary Judgment on the remaining Counts II and III, the District Court granted Defendants' Motion which dismissed Plaintiffs' claims in their entirety, stating:

> "As to Count 3, which is the 1983 claim dealing with denial of substantive due process, again the Court believes that Plaintiffs have not and really cannot prove the defendants' actions regarding Plaintiffs' hotel project were so irrational that they would shock the consciousness of the Court, which is the test that the Court has to apply.
>
> As I say, I have got a lot of feelings for the plaintiffs. I wish they could develop their property, but the Court just doesn't believe it reaches the level of this kind of constitutional violation of almost every case that I have been able to read would dictate.
>
> Therefore, the Court grants the motion for summary judgment."

(See Order and transcript, A-6–A-9.)

On appeal before the Sixth Circuit Court of Appeals, the Court affirmed the District Court's Holding, stating:

> "To prevail on a substantive due process claim, a plaintiff must show that the government entity is guilty of 'arbitrary and capricious action in the strict sense.' *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992). This requires a showing that the decision rendered was without any rational basis. *Id.* The plaintiff must be able to demonstrate that the alleged irrationality of the City was such that it 'shocks the conscience' of the court. *Id.* at 1222. Appellants make no allegations which can be said to 'shock the conscience'." (See Sixth Circuit Opinion, A-1–A-5.)

REASONS FOR GRANTING THE WRIT

I.

THE SUBSTANTIVE DUE PROCESS TEST IS NOT BEING APPLIED CONSISTENTLY AMONG THE CIRCUITS. PROPERTY OWNERS ACROSS THE COUNTRY HAVE DIFFERENT ACCESS TO FEDERAL COURTS DUE TO VARYING TESTS BETWEEN THE CIRCUITS. THE LAW NEEDS TO BE CLARIFIED AND UNIFIED.

A. Many Circuits Have Noted In Their Opinions That There Is A Lack Of Decision By The Supreme Court Regarding The Issue Concerning Land-Use Civil Rights Litigation.

Schaper v. *City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987) declares that substantive due process is an area of law "famous for its controversy, and not know for its simplicity." *Id.* at 716.

The Sixth Circuit in *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), states:

> "Our research further reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning . . . The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." Id., 1214, 1217.

Walz v. *Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995), Pet. Cert. Filed 4/20/95, states that the issue of whether substantive due process protects state-created property rights has not yet been addressed by the Supreme Court. *Id.* at 169.

Reich v. *Beharry*, 883 F.2d 239, 243 (3d Cir. 1989) states that the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court. *Id.* at 243.

For a review of how the circuits are divided on these questions, please refer to *Pearson* v. *City of Grand Blanc*, *supra* at 1217-1219, and below.

B. The Circuits Have Made Inconsistent Interpretations Of What Substantive Due Process Violations Entail Land-Use Litigation.

The First Circuit does not generally recognize a substantive due process violation in land use litigation. *PFZ Properties, Inc.* v. Rodriguez, 928 F.2d 28, 31 (1st Cir. 1991), cert. granted, 112 S.Ct. 414 (1991). Because if the substantive due process' "virtually standardless reach," the First Circuit has held that a substantive due process claim is violated only where the evidence was "*sufficiently conscious-shocking*" or "*shocking or violative of universal standards of decency*," *Licari* v. *Ferruzzi*, 22 F.3d 344, 348 (1st Cir. 1994); *Amsden* v. *Moran*, 904 F.2d 748 (1st Cir. 1990), cert. denied, 498 U.S. 1040 (1991), i.e., "where state actors engage in extreme or intrusive physical contact." *Souza* v. *Pina*, 1995 WL 238785, ___ F.3d ___ (1st Cir. 1995).

The Second Circuit has determined that the issue of whether the denial of a permit was a violation of the substantive due process clause rested upon whether the decision was for arbitrary or irrational reasons. *Walz* v. *Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995), Pet. Cert. filed 4/20/95. *Brady* v. *Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988).

The Third Circuit has declared that the substantive due process clause was intended to protect the individual from the arbitrary exercise of the powers of government, or when government deliberately and arbitrarily abused its power, *Midnight Sessions, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 683 (3rd Cir. 1991); *Bello* v. *Walker*, 840 F.2d 1124, 1129 (3rd Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 134, 102 L.Ed.2d 107 (1988), i.e., evidence from which a fact-finder could reasonably conclude that certain council members "improperly

interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permit." *Id.* According to *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Third Circuit will grant relief on the basis of substantive due process where the zoning decision is irrational in the strict sense, or prompted by invidious political or discriminatory motives. *Id.* at 1218. The factual question for the jury would be whether the City denied the application due to some improper motive such as whether the City denied applications due to some improper motive such as political motivation, racial animus, *Midnight Sessions*, at 683, or an individual's personal or financial interest. *Deblasio* v. *Zoning Board of Adjustment*, 1995 WL 248792, ___ F.3d ___ (3rd Cir. 1995).

The Fourth Circuit has stated that where there is fairly alleged a basis for finding either abuse of discretion, arbitrariness, unfairness or caprice in a zoning administrator's refusal to issue a building permit, a Fourteenth Amendment claim is properly stated and where the zoning action is "tainted with fundamental procedural irregularity, racial animus, or the like" it amounts to an actionable denial of due process. *Scott* v. *Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

The Fifth Circuit has found that arbitrary deprivation of zoning implicated invasion of Fourteenth Amendment Due Process rights. *Shelton* v. *City of College Station*, 754 F.2d 1255 (5th Cir. 1985). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Fifth Circuit views with strong disfavor the idea of federal courts being drawn into local zoning disputes, and classifies all zoning actions, even those pertaining to an individual piece of property, as legislative. *Id.* at 1219.

The Sixth Circuit has applied the "shock the conscience" standard to determine whether there is a sub-

stantive due process violation is a land-use situation. More specifically, it has stated:

> "Although the 'shock the conscience' terminology is more apt for cases involving physical force, it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to underscore the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law . . . referring to *extreme irrationality — after all we would not expect a planning commission or board of adjustments to be pumping the landowner's stomach* . . . Under the foregoing principles, it is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process." (emphasis added). *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992).

The Seventh Circuit has recognized that an arbitrary denial of a building permit may be the basis for a § 1983 action. *Scudder* v. *Town of Greendale*, 704 F.2d 999 (7th Cir. 1983). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Seventh Circuit holds that action could be set aside only if it "invidious or irrational." *Id.* at 1219.

The Eighth Circuit has held that the denial of a building permit may give rise to a substantive due process claim and that the applicants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily by imposing an unconstitutional condition on the granting of the permit. The court further held that the availability of state remedies for a substantive constitutional violation does not preclude recovery under § 1983. *Littlefield* v. *City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986). According to *Pearson* v. *City of Grand Blanc*, *supra*, the Eighth Cir-

cuit judges are in disagreement among themselves as to the correct approach to federal review of local zoning and has stated that the issue of whether a substantive due process claim may arise from a denial of a zoning permit is an open question in that circuit. *Id.* at 1219.

The Ninth Circuit has found that the City's arbitrary decision to reject the plan despite the developer's full compliance with the requirements for a building permit violated his substantive due process rights. *Bateson* v. *Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

The Tenth Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, "imposes a strict property right test similar to the Second Circuit. If that test is met, it will consider whether the zoning was arbitrary and capricious." *Id.* at 1219.

The Eleventh Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, has an approach similar to the Ninth Circuit. *Id.* at 1219.

The District of Columbia Circuit, according to *Pearson* v. *City of Grand Blanc*, *supra*, applies a very deferential standard of review under substantive due process, holding that "only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under Section 1983." *Id.*, 1219.

It is not fair for property owners in varying parts of this country to be treated differently by federal courts, when bringing suit to redress violation of substantive due process. The time has come for this Court to address that issue and clarify the law.

❧ ❧ ❧

II.

THE "SHOCK THE CONSCIENCE" TEST IS A BAD TEST IN LAND USE CIVIL RIGHTS LITIGATION. AN APPROPRIATE TEST WOULD BE THE "ARBITRARY AND CAPRICIOUS" TEST.

A. The Sixth Circuit And First Circuit Have Applied The "Shock The Conscience" Test Set Forth In *Rochin* v. *California*, A Physical Abuse Case, To Land-Use Litigation.

The Sixth and First Circuit rely on *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183 (1952) when they apply the "shock the conscience" test to land use litigation. That case involved a narcotics arrest conducted by police officers by using what amounted to be "excessive force." The Court based its analysis and decision limited to the context of criminal proceedings and it did not indicate that its decision and shock the conscience' test were to be used in civil matters and/or non-violent constitutional deprivations. In its holding, the Supreme Court concluded:

> "we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience . . . to offend even hardened sensibilities. There are methods too close to the rack and screw to permit a constitutional differentiation . . . They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct." *Id.* at 172, 173; 190.

The Sixth Circuit even noted problems associated with applying the "shock the conscience" test to situations other than excessive force. In *Braley* v. *City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990), the court noted:

> "Applying the 'shock the conscience' test in an area other than excessive force . . . is problematic. Not only are there fewer instances in the case law, but the 'shock the conscience' test is not as uniformly applied to cases where excessive force or physical brutality is not the basis of the claim. The 'shock the conscience' standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court's power to interpret objectively where there is a dearth of previous decisions on which to base the standard. We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity . . . Therefore, because the present case does not concern physical abuse, we are reluctant to apply the 'shock the conscience' standard and decline to do so." *Id.*, quoted by *Mansfield Apartment Owners* v. *City of Mansfield*, 988 F.2d. 1469, 1478 (6th Cir. 1993).

Pearson v. *City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992) stated that "the 'shock the conscience' terminology . . . is more apt for cases involving physical force. In doing so, if found that such circumstances would, in fact, be 'extremely rare.'" *Id.* at 1222.

B. The "Shock The Conscience" Test Is Not Appropriate For Land Use Cases.

Writers recently have criticized the Sixth Circuit's *Pearson* holding of "shock the conscience" test in land use cases.[4]

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4 Robert E. Roberts, Professor of Law at Wake Forest University School and Thomas C. Shearer wrote "Land-Use Litigation: Takings and Due Process Claims," *Urban Lawyer*, Vol. 24, No. 4, Fall 1994; Donald D. Dripps, Professor of Law at University of Illinois wrote "At the Borders of Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense,"

(concluded on page 16)

Roberts and Shearer discuss the "shock the conscience" test applied in *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991), cert. granted, 112 S.Ct. 414 (1991), noting recent rejections of land-use claims by the lower courts that are not found "worthy of the time of the federal bench." They stated, "if the Supreme Court is dissatisfied with the trend toward total deference, the Court might tighten up on use of the conceivable basis test and impose some burden on governmental authorities to justify delay." (emphasis added) *Id.* at 838 and 839. The authors refer to other recent decisions such as *Elsmere Park Club Ltd. Partnership* v. *Town of Elsmere*, 771 F.Supp. 646 (D.Del. 1991) and *Corn* v. *City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D. Fla. 1991) whereby the district courts found violations of substantive due process claims in land-use disputes without referring to the "shock the conscience" standard.

Professor Dripps argues that the "shock the conscience" test for substantive due process claims is far too narrow because it approves of police conduct that is unreasonable and offensive, so long as it does not shock the conscience. *Id.* at 261. He states:

> "The outrageousness formula is irreconcilably at odds with the selective incorporation decisions . . . Only in the context of police practices not involving searches, seizures, or interrogations, however, has the Court derived the requirement of outrageousness for due process violations . . . *In sum, as a test of substantive rights the shock-the-conscience standard is inconsistent with just about every other aspect of the constitutional law*

(*continued from page 15*)

***University of Illinois Law Review*, Vol. 1993, No. 2, p. 261; Richard H. Fallon, Jr., Professor of Law at Harvard Law School, wrote "Some Confusion About Due Process, Judicial Review, and Constitutional Remedies," *Columbia Law Review*, Vol. 92, No. 2 (March 1993), p. 309.**

> *of criminal procedure. The test is also far too narrow from a policy standpoint.* The *Rochin* Court self-consciously sought to articulate a very narrow exception to the *Wolf* rule, which the Justice had announced but three years before. Borrowing the restrictive language as the test of substantive rights implies a narrow, grudging view of what rights the judges ought to recognize. The intensity of the condemnation required by the *Rochin* test is wholly inappropriate for a post-Holocaustal age. Murder, torture, and slavery are the familiar features of recent history. Nowadays, 'hardened sensibilities' are shocked by nothing. Few of us are shocked or outraged . . . The current due process test draws from this premise the conclusion that these tactics are permissible even without a scintilla of suspicion that the targets are engaged in criminal activity. . . . The constitutional text, its history, or Supreme Court precedents commanded this result, that would be one thing. Text, history, and precedent, however, command nothing of the sort. The *shock-the-conscience formulation should be abandoned.*" *Id.* at 270-272 (emphasis added).

Professor Fallon cites the confusion in the application of a due process claim, stating:

> "Substantive due process doctrine reflects the simple but far-reaching principle that government cannot be arbitrary. Government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable relationship between government's ends and its means . . . The ultimate commitment of the law of due process remedies — analogous to that of procedural due process — is to create schemes and incentives adequate to keep government, overall and on

> average, tolerably within the bounds of law." *Id.* at 310-311.

Fallon sets forth that current problem of the substantive due process doctrine under current law is the uncertainty about which government actions are subject to substantive due process scrutiny and about which constitutional standards should apply asking: "Are isolated acts of government officials — alleged constitutional torts — challengeable on substantive due process grounds?" and "What is the test for identifying substantive due process violations?" *Id.* at 312-313.

Fallon recognizes that substantive due process claims are widely viewed as the most problematic category in constitutional law. *Id.* at 314. Fallon reviewed various decisions for establishing the applicability of substantive due process principles, under *Rochin* v. *California*, *supra*, against *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), (which both found a substantive due process violation) recognizing the former used the "shock the conscience" standard whereas the later set forth that the government acted without a basis for its finding that the applicant failed to meet the required standards for admission to the bar. His conclusion was that no agreed framework has emerged for identifying when relatively isolated official acts offend substantive due process. Fallon stated:

> "The Court has established that conscience-shocking action violates due process, and, on one view, government action shocks the conscience only then it trenches on a fundamental right. . . . Involving what the Court has classified as non-fundamental liberty and property interests, perhaps the most familiar formulation suggests that officials must not engage in 'arbitrary' conduct. But the Supreme Court has not held that all arbitrary official conduct violated the Constitution, and it suggests in one recent case that conduct could be 'arbitrary' . . . in the con-

> stitutional sense only if it shocked the conscience. The Court has not taken so narrow of a view in the past, however, and it has upheld substantive due process claims in subsequent cases without adverting to the 'shock the conscience' standard . . . In an entirely understandable reaction, the Supreme Court in recent years has more often sought to avoid than to answer the question of what duties of care substantive due process imposes." *Id.* at 324-326.

C. The Supreme Court Should Adapt The "Arbitrary And Capricious" Standard Set Forth By The Majority Of Circuits As The Appropriate Standard For Substantive Due Process Violations In Land-Use Litigation.

The *Deblasio* Court found it hard-pressed to find a property interest more worthy of substantive due process protection than ownership. In the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff should state a substantive due process claim where he or she alleges the decision limiting the intended land use was arbitrarily or irrationally reached. *Id. Deblasio* v. *Zoning Board of Adjustment* at 6.

Finding property interests *worthy of federal court jurisdiction*, the *Deblasio* Court applied the "deliberate and arbitrary abuse" standard rather than the "shock the conscience" standard. *Plaintiffs assert that Deblasio's standard is the appropriate standard that this Court should adapt for land use litigation under the substantive due process clause because it protects property interests more accurately as provided for under the United States Constitution.*

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III.

DEFENDANTS' ACTIONS IN THIS CASE CREATE GENUINE ISSUES OF MATERIAL FACT SHOWING VIOLATIONS OF PLAINTIFFS' RIGHTS TO SUBSTANTIVE DUE PROCESS, UNDER ANY REASONABLE TEST.

A. Standard Of Review

Since the standard of review before the Sixth Circuit Court of Appeals was *de novo*, the appellate court was permitted to draw its own inferences and legal conclusions from the record presented. *Landcaster Glass Corporation* v. *Philips ECG, Inc.*, 835 F.2d 652, 658 (6th Cir. 1987).

De novo review applies to questions of law, *In re Edward M. Johnson & Assoc., Inc.*, 845 F.2d 1395, 1398 (6th Cir. 1988), including but not limited to statutory interpretation, *United States* v. *Hans*, 921 F.2d 81, 82 (6th Cir. 1990) and mixed questions of law and fact, *Blackburn* v. *Foltz*, 828 F.2d 1177, 1181 (6th Cir. 1987), cert. denied, 485 U.S. 870 (1988). The district court's decision should have been sustained only if there was no genuine issue of material fact and the moving party was entitled to judgment as a matter of law. F.R.C.P. Rule 56(c) 28 U.S.C.A.; *City of Mount Clemens* v. *United States, Envtl. Protection Agency*, 917 F.2d 908, 914 (6th Cir. 1990).

B. The Case Should Not Have Been Dismissed On A Rule 56 Motion As There Are Genuine Issues Of Material Facts Of Substantive Due Process Violations.

The present case is very similar to cases in other circuits which declared such acts as violations of substantive due process.

As compared to *Walz* v. *Town of Smithtown*, *supra*, where the language of the ordinance was such that so long as there was no discretion to deny a permit or refuse to issue another permit so long as the applica-

tion was met the expressed code requirements, *id.* at 168, the City of Harper Woods, likewise, did not have discretion to deny Plaintiffs' Special Use Permit that complied with the City Ordinances and had been previously granted where there was no substantial change of circumstance and Section 10-164 of the City Ordinance did not allow for discretion.

As compared to *Deblasio* v. *Zoning Board of Adjustment, supra*, where evidence existed that the permit was denied based upon minor "technicalities," that certain council members had *personal animosity* towards one of the plaintiff's employees and that a fact-finder could conclude that certain council members improperly interfered with the process by which the City issued permits, that they did so for partisan political or personal reasons unrelated to the merits of the application for the permit and that the governmental decision in question impinged upon a landowner's use and enjoyment of property, *id.* at 8, Defendants committed similar acts towards plaintiffs in the present case.

As compared to *Scott* v. *Greenville County, supra*, where the defendants intervened with the developer's property and due process rights differently than it had done to other applicants in the past and such *intervention into the process was motivated by a lack of impartiality towards him, and was such a departure from established practice and applicable law that he was denied due process*, Defendants clearly were motivated by and treated Plaintiffs with impartiality and biased treatment.

As compared to *Bello* v. *Walker, supra*, where there was evidence that the City denied the permit for purely personal and political reasons, Plaintiffs provided ample evidence that Defendant McNally was motivated by personal and political reasons. He even expressed in his deposition that he did not believe he needed to be unbiased towards Plaintiffs.

As in *Bateson* v. *Geisse*, the developer applied for a building permit for a condominium project and thereafter modified his plan to conform with the City officials' objections. The City continued to reject his claim. The City arbitrarily decided to reject the plan despite the developer's full compliance with the requirements for a building permit. *Id.* at 1303.

As compared to *Elsmere Park Club Ltd. PRTP* v. Town of *Elsmere*, 771 F.Supp 646 (D.Del. 1991), where the town's actions of denial of a permit constituted unlawful delay in violation of substantive due process, Defendants' actions likewise caused extensive delays for the last ten years that Plaintiffs have attempted to construct the hotel project.

As compared to *Corn* v. *City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D. Fla. 1991), where the City denied a special use permit, expressed warrantless concerns for increased traffic, noise and other adverse effects allegedly that would be caused by the particular project, targeted only that particular project use for limitation, leaving a number of uses that arguably cause more traffic, noise, and air pollution and *was motivated solely by an irrational desire to thwart the plaintiff's plans,* Defendants acted similarly to Plaintiffs.

In this case the substantive due process claim was dismissed by the District Court on a Rule 56 motion, that there is no genuine issue on a material fact, applying the "shock the conscience" standard for substantive due process violations. In the Court of Appeals, Appellees confused the facts by arguing facts that were not in the record, citing discretionary standards when there were none and belittling Plaintiffs' efforts to start the hotel project going. Fighting for their day in court is very difficult when Plaintiffs must "shock" the court in order to have a trial and Plaintiffs' day in court.

In their Court of Appeals Brief, Appellees argue Plaintiffs had not complied with the ordinance and that

Appellees had discretion to deny the reapplication for a new approval of the special land use permit. Nothing could be further from the truth.

There was full compliance with all City Ordinances. On a number of occasions, including the one last time just before the City Council's consideration on October 5, 1992, the Planning Commission had approved the site plan and recommended approval of this project. Further, as appears from the statement of a City Council Member in the minutes of the October 5, 1992 meeting, the City Manager and the City Attorney both recommended approval of this application, based on full compliance with City Ordinances.

It must be remembered this project had been previously approved by the City Council. A one year period of time to start the project had expired. Extension of that one year had twice been denied. At the City's instructions, Plaintiffs reapplied for the special land use approval, having to submit all documents and go through the same procedure again. The City Council's approval of May 5, 1991 demonstrates there was full compliance with City Ordinances.

Cities and towns routinely provide that special land use approvals or site plans expire if construction does not start within one year of the approval. The basis for enforcing this limitation is to protect the City's ability to enforce any new ordinance standards or regulations that were adopted during the one year period. With the approval there was a vested right not to comply with new requirements. For the one year period after that, it is only fair a new development comply with new ordinances, standards and regulations.

This is the only possible legal basis for denying Plaintiffs' two requests for extensions of the one year period and their reapplication for reapproval of the special land use. In this case, there were no new ordinances, standards or regulations. Therefore, to deny Plaintiffs

the right to proceed, without a change of circumstances, constituted "arbitrary and capricious" denial of Plaintiffs' right to substantive due process.

There were in fact no new circumstances from the approval Plaintiffs previously had. Plaintiffs had a right to develop the property which was unfairly, arbitrarily and capriciously taken from them, to serve the personal political whims of Defendants.

The context of all of this further demonstrates how Plaintiffs were beat down to a victim's status after the involvement of Defendant McNally. The City had encouraged Plaintiffs to pursue the hotel project through various acts, such as a special resolution adopted in May 1991, which induced Plaintiffs to incur large out-of-pocket expenses of approximately $500,000.

After entrance of Defendant McNally on the scene, there was a long series of needless and unreasonable and highly expensive delays and obstacles erected by Defendants. After receiving the special land use approval on May 5, 1991, Plaintiff Handlos suffered a sudden loss of hearing, his personal affliction, which was a sufficient basis for the extension. Disregarding that, Defendants continued to make life difficult for him. Because of his deafness, he was not able to put together the financing and get the project started on a timely basis. In January 1992, Plaintiffs requested an extension of the one year approval period, and were denied. As the one year was about to expire, Plaintiff Handlos panicked and tried to protect his rights by personally going onto the property and starting construction. No new City permit was necessary to make the curb cut and start construction. Rather than understanding Plaintiffs' difficulties, Defendants played "hardball," demanding an exorbitant bond for 5% of the value of the completed buildings. Normally bonds are only filed to ensure completion of public improvements, not the completion of buildings which the City will not own.

In this litigation, Defendants have trivialized Plaintiff Handlos' attempt at construction as a demonstration this man could not possibly finance a hotel construction. This is entirely insensitive and unfair. There was no evidence that he could not complete the project if he had only been given a fair chance to start it.

The facts at trial will show that had Defendants recognized Plaintiffs' valid legal rights and Plaintiffs had reacted reasonably in respect to the request for extensions of the one year period and had not created other road blocks, the hotel project would have gotten off the ground. When someone is afflicted with deafness and then is ambushed and beat down by the City, it can be understood why the circumstances for Plaintiffs went from bad to worse. Plaintiffs did not have a fair chance and they should now have their day in court to redress the arbitrary and capricious actions of the Defendants in this case.

There are genuine issues of material fact under any reasonable standard for determining whether there are violations for substantive due process of law.

Respectfully submitted,

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